UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,

Plaintiff,

And

NATURAL RESOURCES DEFENSE COUNCIL, INC. AND SIERRA CLUB,

Intervenor-Plaintiffs,

v.

DTE ENERGY COMPANY AND DETROIT EDISON COMPANY,

Defendants.

Civil Action No.
2:10-cv-13101-BAF-RSW

Judge Bernard A. Friedman

Magistrate Judge R. Steven Whalen

DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

PRELIMINARY STATEMENT

The case EPA describes in its opposition to this Motion differs materially from the case it framed in its Notice of Violation (NOV). That case, as described in the NOV, the Rule 26(f) Report, and the expert declarations and other papers it submitted in support of its Motion for Preliminary Injunction, focused on the three Tube Projects, each of which EPA contended were "major modifications" undertaken in violation of NSR. Since that time, EPA's case has morphed into something quite different. The claim now is that the aggregation of work performed during the Outage is a single "modification" that violated NSR.

This "evolution" has consequences. At the January 19 hearing, counsel for EPA represented to the Court that, based on the record developed in connection with its Motion for Preliminary Injunction, the case was one that could be "[tried] in another 90 days as the Court has suggested." Ex. 3, Jan. 19, 2011 Hr. Tr. at 144. Based on this representation, the Court set an aggressive schedule, and in the time since, Detroit Edison has been hard at work preparing to defend against the case framed in the NOV, in the Rule 26(f) Report, and in EPA's preliminary injunction papers. As a practical matter, expanding the case in the way EPA seeks will force Detroit Edison to revamp its ongoing process for collecting and reviewing documents. That would significantly hinder the preparation of this case for a September trial.

The notice requirement in section 113(a) is meant to avoid this type of bait and switch. "[T]o allow the EPA to notify the alleged offender of one violation, and then bring a civil action on the basis [of] another violation (different than that alleged in the notice) . . . would completely frustrate the notice requirement created by Congress." *United States v. Louisiana-Pacific Corp.*, 682 F. Supp. 1122, 1128 (D. Colo. 1987). Detroit Edison accordingly asks the Court to confine EPA's case to the violations specified in the NOV and enter a protective order that limits EPA's

discovery to the Tube Projects so that the parties can attempt to fairly try the liability phase of this case in September as scheduled.

ARGUMENT

I. The Notice Requirement Is Jurisdictional and Cannot Be Ignored.

As Detroit Edison explained in its Opening Brief, section 113's notice requirement is jurisdictional. *See United States v. LTV Steel Co.*, 116 F. Supp. 2d 624, 632 (W.D. Pa. 2000) ("A jurisdictional prerequisite to the U.S. EPA's filing suit, however, is that it comply with the CAA's notice requirement at 42 U.S.C. Section 7413(a)(1)."). Accordingly, EPA is only authorized to bring suit based on the "specific violation[s] alleged in the NOV." *United States v. AM General Corp.*, 808 F. Supp. 1353, 1362 (N.D. Ind. 1992).

EPA's NOV here states plainly in Paragraphs 20 and 21 that EPA considered the three Tube Projects to be the "major modifications" that triggered NSR permitting:

> 20. The construction activities that DTE commenced on or about March 13, 2010, include, but are not limited to the following work on the unit's boiler: [1] replacement of economizer tubes; [2] replacement of reheat pendants; and [3] replacement of a section of waterwall tubes and burner cells.
>
> 21. EPA has calculated that the replacement projects identified in Paragrpah [sic] 20 are major modifications under the Clean Air Act and the Michigan implementing regulations, as they will result in projected emissions increases in excess of 40 TPY of NOx and SO_2.

Ex. 1 at 4. So the "specific violations" identified in the notice are the three separate projects that allegedly constituted "major modifications" triggering NSR. Nothing in the NOV suggests that EPA considered these projects to be so interdependent as to justify treating them as a single project. This interdependence is the hallmark of any claim involving aggregated projects.

EPA argues in its opposition that it nonetheless has satisfied the notice requirement because Detroit Edison had "actual knowledge" that EPA would take this position. EPA's Br. at 5

(citing *United States v. Chevron U.S.A., Inc.*, 380 F. Supp. 2d 1104, 1109 (N.D. Cal. 2005)).[1] But none of the documents that EPA cites speaks to interdependence at all. For example, EPA points to the Planned Outage Notification that Detroit Edison sent to Michigan regulators three months before EPA's NOV and notes that this notification shows that "Defendants themselves . . . identified the work in the Spring 2010 outage." EPA Br. at 3. But that notice was prepared months before EPA issued its NOV, and nothing in it describes the projects as sufficiently related to justify aggregation. To the contrary, the notice describes the "work" as a number of "project*s*" or "activit*ies*," each of which is routine maintenance, repair and replacement under the applicable NSR rules. EPA also seizes on stray instances where Detroit Edison described the Outage as "the Project." But again, none of these statements show that Detroit Edison ever understood that EPA would contend that all of the work performed during the Outage was so substantially related as to justify treating it as a single "modification" for purposes of the NSR analysis. Rather, in the Rule 26(f) Report, EPA confirmed that its focus would be "the replacement of the economizer, high temperature reheater, and waterwalls." Dkt. Entry No. 40 at 2-3.

II. Even Had EPA Identified Other Projects in Its NOV and Rule 26(f) Report, Aggregation of Projects May Occur Only in Limited Circumstances.

Contrary to EPA's suggestion, Detroit Edison does not contend that "a 'collection of work' performed during a single outage can *never* be treated as a single project." EPA Br. at 8-9. As Detroit Edison noted in its Opening Brief, there are situations where a collection of projects are so technically interdependent that they may be analyzed as one project. Opening Br. at 15. And in those situations, NSR requirements cannot be avoided by "'carving out, and seeking

[1] The circumstances under which "actual knowledge" can be deemed sufficient substitute for notice under section 113(a) are limited. *See, e.g., Chevron*, 380 F. Supp. 2d at 1109 (rejecting challenge to adequacy of notice preceding suit filed to enter a consent decree because Defendant negotiated the terms of the consent decree and was thus familiar with its content).

separate treatment of, significant portions of ***an otherwise integrated renovation program.***'" EPA Br. at 9 (citing D. Clay Feb. 15, 1989 Letter to J. Boston at 7-8) (emphasis added). But as it did in its NOV, EPA ignores the key question: Are the Outage projects part of "an otherwise integrated renovation program" such that they must be aggregated?[2]

The projects described in the cases and applicability determinations cited in EPA's opposition are examples of integrated projects, and they differ markedly from the work performed during the Outage.[3] Each of these cases involved a key ingredient — a substantial relationship between the projects — that is missing here. EPA has never alleged that the work performed during the Outage is interrelated in this way, and it notably failed to specifically identify any other projects in its NOV, much less make an aggregation.

As Detroit Edison explained in its Opening Brief, these "aggregation" cases are the exception and not the rule. The focus of the inquiry in the typical case is on the specific piece of equipment to be repaired or replaced. *See, e.g., NPCA v. TVA*, No. 3:01-CV-071, 2010 WL 1291335 (E.D. Tenn. Mar. 31, 2010). EPA cannot aggregate unrelated projects at its whim.

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[2] As Detroit Edison noted in its Opening Brief, EPA's own January 19, 2009, "Aggregation Rule" is presently under review while the EPA considers additional comments concerning the degree of relatedness necessary to justify aggregation. Opening Br. at 17. But there is agreement that EPA always has looked to the "intrinsic relationship" of projects when considering whether to aggregate. *See, e.g.,* Ex. 12, Memo. from J. Rasnic to G. Czerniak at 4 (June 17, 1993). Indeed, there must be *some* standard for deciding if two or more projects can be aggregated, whether undertaken during the same outage or different outages over an extended span of time. So regardless of the fate of EPA's January 2009 aggregation rule, if EPA intended to aggregate here, it was obliged to say so.

[3] For example, the work that Wisconsin Electric and Power Company (WEPCO) sought be considered as a standalone project was not simply one of many projects performed during a scheduled outage. It was "an integral part of the overall . . . life extension project" for WEPCO's Port Washington plant. EPA Ex. 3 at 7. Similarly, the work at issue in the Casa Grande determination was part of a single effort to revive a dormant processing plant that had been permanently shuttered more than 10 years before. *See* EPA Ex. 4. The work involved was economically interdependent because all of it was needed to allow the plant to function at all. EPA Ex. 4 at 6. And in *United States v. Murphy Oil USA, Inc.*, 155 F. Supp. 2d 1117, 1141 (W.D. Wis. 1990), the court concluded that it could aggregate a series of projects because they were part of an integrated plan to allow the defendant's refinery to produce low sulfur diesel fuel.

Otherwise, it could manufacture violations where none exist by combining projects (including projects not identified in its NOV) that otherwise do not constitute major modifications into a single project that might. Just as a single integrated project cannot be carved up a into individual parts to avoid NSR permitting, multiple unrelated projects cannot be lumped together to trigger NSR. If EPA intended to treat the individual projects performed during the Outage as a single project, it was obliged to say so in its NOV. EPA failed to do so and instead identified specific replacement projects as "major modifications." Allowing EPA to shift gears now would "completely frustrate" the notice requirement. *Louisiana-Pacific*, 682 F. Supp. at 1128.

III. Detroit Edison Is Not Seeking Delay.

EPA accuses Detroit Edison of filing this motion for dilatory purposes. But Detroit Edison is seeking a protective order in an effort to preserve the schedule, not to frustrate it. The Court and the parties understood at the January 19 hearing that EPA's case would be the case framed by the NOV and articulated in EPA's submissions in support of its motion for preliminary injunction and its Rule 26(f) Report. The schedule entered by the Court might be able to accommodate that case. But it cannot accommodate a case that encompasses every other project performed during the Outage as well. The Court should grant Detroit Edison's motion for protective order. *See McNulty v. Reddy Ice Holdings, Inc.*, No. 08-cv-13178, 2011 U.S. Dist. LEXIS 17182 (E.D. Mich. Feb. 22, 2011) (denying motion to compel discovery as to topics that exceeded the scope of the case as articulated in the parties' Rule 26(f) report).

Respectfully submitted, this 15th day of April 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2011, the foregoing **DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PROTECTIVE ORDER** was electronically filed with the Clerk of Court using the ECF system, which will automatically send notification to the following attorneys of record:

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EXHIBIT 12
TO DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 17 1993

JUN 23 1993

OFFICE OF
AIR AND RADIATION

MEMORANDUM

SUBJECT: Applicability of New Source Review Circumvention Guidance to 3M - Maplewood, Minnesota

FROM: John B. Rasnic, Director
Stationary Source Compliance Division
Office of Air Quality Planning and Standards

TO: George T. Czerniak, Chief
Air Enforcement Branch
Region V

This is in response to your memorandum dated March 16, 1992, requesting guidance on New Source Review (NSR) permitting for the Minnesota Mining and Manufacturing (3M) Center located in Maplewood, Minnesota. Specifically, you requested guidance on the applicability of the circumvention guidance to this source and other sources in similar situations. We also received from your staff more information about the modifications at 3M and we suggested that you issue a §114 request to the source for more information. In early November, we received a copy of the response to the §114 request dated October 30, 1992. We hope this memorandum provides sufficient guidance on permitting this source and other sources in similar situations.

Background

In your memorandum of March 16, 1992, you notified us that the 3M Center in Maplewood, Minnesota received four synthetic minor permits for modifications between October 1991 and March 1992. The permits for the four modifications combined allow emission increases of 33.6 tons per year (tpy) of particulates, 39.8 tpy of sulfur dioxide, 39.4 tpy of nitrogen dioxide, 22.0 tpy of carbon monoxide, and 119.2 tpy of volatile organic compounds. You learned during the Region's discussions with Minnesota that in 18 months, the source received 12 minor permits, and applied for several other minor permits. As a result, you indicated to the Minnesota Pollution Control Agency (MPCA) that 3M may be circumventing the Prevention of Significant Deterioration (PSD) regulations through these small projects. The MPCA, however, felt that these modifications were justified as separate modifications based on each 3M division pursuing its own research schedule.

Although it is somewhat unclear, the response to the §114 request arguably supports 3M's justification. Yet in light of criteria for identifying circumvention situations, as further explained below, the Stationary Source Compliance Division (SSCD) believes the source may not have been permitted properly for its modifications.

EPA Policy and Authority

EPA stated in the June 28, 1989 Federal Register notice on the definition of federally enforceable (54 FR 27274) and in its June 13, 1989 guidance on "Limiting Potential to Emit in New Source Permitting" that it is not only improper but also in violation of the Clean Air Act to construct a source or major modification with a minor source permit when there is intent to operate as a major source or major modification. Permits with conditions that do not reflect a source's planned mode of operation are sham permits, are void ab initio, and cannot shield a source from the requirement to undergo preconstruction review. 40 CFR §52.21(r)(4) requires application of NSR requirements to a source that asks for a relaxation of permit limits which would make the source major. EPA stated that it will require application of §52.21(r)(4) even where a source legitimately changes a project after finding it cannot comply with the operating restrictions which were taken in good faith.

Generally in "sham" permitting, a source attempts to expedite construction by securing minor source status through permits containing operational restrictions from which the source intends to free itself shortly after completion of construction and commencement of operation. Such attempts are treated as unlawful circumvention of the preconstruction review requirements. Similarly, attempts to expedite construction by securing several minor source permits and avoiding major modification requirements should be treated as circumvention. A memorandum dated September 18, 1989 from John Calcagni to William Hathaway stated this position (see Memorandum 4.42 in the NSR Guidance Notebook).

EPA stated in the 1989 Federal Register notice that it is not possible to set forth, in detail, the circumstances in which EPA considers an owner or operator to have evaded preconstruction review through minor permits, and thus subject itself to enforcement sanctions under §§113 and 167 from the beginning of construction. However, EPA will look to objective indicia to identify circumvention situations. For example, EPA provided examples of objective criteria in the June 13, 1989 guidance on limiting potential to emit. EPA also stated some criteria in the Federal Register notice which include: the filing of an application for a federal PSD permit at or near the same time as a state minor source permit; the economic realities surrounding a transaction; and projected levels of operation as portrayed to

lending institutions and other records of projected demand and output. EPA stated that where it appears obvious that a proposed source or modification, by its physical and operational design characteristics, could not economically be run at minor source levels for an appreciable length of time, EPA will consider minor source limits taken by the source unrealistic and sham.

Specific Criteria

Similar to the 1989 guidance, this memorandum provides criteria to permitting and enforcement authorities to apply when making determinations whether a source is circumventing major NSR through the minor modification process.

1. Filing of more than one minor source or minor modification application associated with emissions increases at a single plant within a short time period.

If a source files more than one minor source permit application simultaneously or within a short time period of each other, this may constitute strong evidence of an intent to circumvent the requirements of preconstruction review. Authorities should scrutinize applications that relate to the same process or units that the source files either before initial operation of the unit or after less than a year of operation. The September 18, 1989 memorandum from John Calcagni to William Hathaway states that two or more related minor changes over a short time period should be studied for possible circumvention.

2. Application of funding.

Applications for commercial loans or, for public utilities, bond issues, should be scrutinized to see if the source has treated the projects as one modification for financial purposes. If the project would not be funded or if it would not be economically viable if operated on an extended basis (at least a year) without the other projects, this should be considered evidence of circumvention.

3. Reports of consumer demand and projected production levels.

Stockholder reports, reports to the Securities and Exchange Commission, utility board reports, or business permit applications should be reviewed for projected operation or production levels. If reported levels are necessary to meet projected consumer demand but are higher than permitted levels, this is additional evidence of circumvention.

4. Statements of authorized representatives of the source regarding plans for operation.

Statements by representatives of the source to EPA or to State or local permitting agencies about the source's plans for operation can be evidence to show intent to circumvent preconstruction review requirements.

5. EPA's own analysis of the economic realities of the projects considered together.

EPA may determine that it is reasonable to expect that company management would coordinate the planning and execution of projects considering their intrinsic relationship with each other (physical proximity, stages of production process, etc.) and their impact on economic viability of the plant (scheduling down time in light of production targets, economies of scale, etc.).

Analysis of 3M-Maplewood

Although 3M applied for and received several minor source permits within 18 months, in response to the §114 request, 3M stated that independent divisions at the plant made the funding decisions for each independent project and that each project is independently viable. Thus, they suggest, the projects are not part of an attempt to circumvent preconstruction review. 3M and Minnesota have indicated that the divisions' actions should be reviewed separately and should not be treated as parts of a whole. However, the law plainly treats the Maplewood plant as one major emitting facility for NSR purposes. The NSR regulations do not provide special treatment because it is a research and development plant. Further, given the nature of this source, under normal conditions, a certain level of production or research development of new products can be expected. Although the NSR program generally allows sources to modify below significance levels without aggregating other contemporaneous net increases, sources cannot use the minor modification process to circumvent major modification requirements.

Where a source is permitted for several minor modifications that may in good faith be intended to be separate but result in the source's aggregate increases to be major even considering decreases over a short time period (e.g., one year or 18 months), the modifications may require major new source review. Such modifications could require NSR if they are viewed as being consistent with the source's overall production goals or plans for a short planning period. In other words, 3M should not benefit from the absence of a plant-wide production plan. Given the nature of the plant's work, 3M may be able to reasonably anticipate that modifications will occur within a relatively short period of time.

Reports on consumer demand and projected production or emission levels may provide evidence that this plant is expected to modify regularly in response to such demands or research needs. Some minimum level of research activity and commensurate emissions, source-wide, perhaps could be expected from year to year, as would be expected to keep the 3M plant productive or operable. These emissions and thereby modifications cannot be presumed to be independent given the plant's overall basic purpose to support a variety of research and development activities. Therefore, even though each research project may have been individually conceived and separately funded, it is appropriate to look at the overall expected research activity in assessing NSR applicability and enforcement.

Without regard to whether 3M intended to circumvent NSR requirements, this source and the State should discuss alternative permitting that could minimize the uncertainty of intent. Although we cannot require aggregation of all de minimis net increases, we believe that net increases should be aggregated for each "planning period" of the plant. One way to treat this source is to set a plant-wide emissions level, that can be raised only by going through major NSR. Recently, we worked with you and the MPCA to develop a plantwide emissions cap permit for a 3M facility in St. Paul. Although there are a number of concerns that must be addressed in such an approach, we believe that the source and the State would benefit from the certainty that such an approach provides.

If you have any questions regarding this matter, please contact Clara Poffenberger at (703) 308-8709.

cc: Karen Schapiro, OE
Greg Foote, OGC
Bill Lamason, AQMD
Air Division Directors
NSR contacts